

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

XO Illinois, Inc. and Allegiance Telecom)	
of Illinois Inc.)	
)	
vs.)	
)	
Illinois Bell Telephone Company,)	Docket No. 05-0156
d/b/a SBC Illinois)	(consolidated with 05-0154
)	and 05-0174)
In the Matter of a Complaint)	
Pursuant to 220 ILCS 5/13-515,)	

**APPLICATION FOR REHEARING OF
XO ILLINOIS, INC. AND ALLEGIANCE TELECOM OF ILLINOIS INC.**

Pursuant to Section 200.880 of 83 Illinois Administrative Code, XO Illinois, Inc. and Allegiance Telecom of Illinois Inc.¹, through their attorneys, hereby submit their Application for Rehearing of the Commission's final Order in this proceeding ("Commission Order" or "Final Order") issued on June 2, 2005. For the reasons contained herein, the Commission should grant rehearing and modify the Commission Order consistent with the following arguments.

- I. The Commission Should Clarify that the 28-Day Negotiation Window for the Definition of "Embedded Customer Base" Applies to All TRO Affected Elements, Including Unbundled Local Switching, Unbundled High Capacity Loops and Unbundled Dedicated Transport.

The Commission directed the parties to negotiate the meaning of "embedded customer base" within 28 days after the final order in this proceeding. While the parties

¹ Since the initiation of this proceeding, XO and Allegiance have merged into XO Communications Services, Inc., which is the survivor by merger of those two companies.

have successfully met that deadline for defining embedded customer base as it applies to Unbundled Local Switching and Unbundled Network Element Platform (“ULS/UNE-P”), SBC has taken the position that the Commission directive does not apply to other TRRO affected elements, such as high capacity loops and dedicated transport. XO and Allegiance believe that SBC’s reading of the Commission Order is in error because, although the TRRO imposed limited section 251 unbundling obligations for high capacity loops and dedicated transport, the FCC did require ILECs to continue providing those elements for CLECs’ embedded base of end-user customers during a 12-month transition period following the effective date of the TRRO.

This Commission’s Final Order noted that “having mandated different post-impairment treatment for embedded and non-embedded customers, the FCC left open the practical task of distinguishing one group from the other.”² The Final Order further identified several aspects of the definition of “embedded” that the parties must negotiate in order to determine “who” is an embedded customer.³ Therefore, the Final Order required the parties to commence a 28-day negotiation period, “confined to establishing the bases for distinguishing embedded and non-embedded customers.”⁴ At pages 42-43 of the Final Order, the Commission held that: “to prevent or minimize such denials regarding ULS/UNE-P, SBC and each complaining CLEC shall, during a period not to exceed 28 days from the date on which this Order becomes final, negotiate and agree upon terms, conditions and processes by which embedded and new ULS/UNE-P customers will be distinguished.”

² Final Order at 9.

³ Id. at 9-10.

⁴ Id. at 10.

The definition of “embedded customer base” is equally applicable to all TRRO affected elements. Although this Commission’s Final Order did not explicitly list unbundled high capacity loops and unbundled dedicated transport along with its 28-day negotiation window for “ULS/UNE-P”, the definition of embedded customers is equally relevant to those elements. The Final Order acknowledges that the term “embedded customer base” is equally applicable to unbundled dedicated transport and unbundled high capacity loops. At pages 17-18 of the Commission’s Final Order, the Commission noted that “The TRRO applies some of the same directives to dedicated transport that it applies to ULS/UNE-P. . . As with ULS/UNE-P, those transitions are limited to the CLEC’s embedded customer base. Similarly, for high capacity loops, the Final Order states: “the TRRO also established transition requirements for loops. . . As with ULS/UNE-P, those transitions are limited to the CLEC’s embedded customer base.”⁵ If the 28-day negotiation window were to only apply to ULS/UNE-P, the Parties will be forced to duplicate those negotiations for unbundled high capacity loops and unbundled dedicated transport through the dispute resolution process of the Parties’ ICAs. XO and Allegiance believe that that resulting delay in identifying the elements that are subject to the transition period would be contrary to the intent and framework of the Commission’s Final Order. XO and Allegiance therefore respectfully request that the Commission clarify that the Commission’s 28-day negotiation window for the definition of “embedded customer base” applies to all TRRO affected elements and not just ULS/UNE-P.

⁵ Id. at 21.

II. The Commission Should Grant Rehearing Because the Final Order Arbitrarily Reduced XO's and Allegiance's Attorney's Fees.

The Final Order acknowledges that the Commission has “tied the award of fees and costs under 13-516 to a party’s litigation success.”⁶ Yet, despite complete success in the relief requested, the Commission awarded XO and Allegiance only 70% of their attorney’s fees. The Commission should revise its order to award 100% of attorney’s fees.

In their complaint, XO and Allegiance had two main requests for relief: (1) emergency relief pursuant to Section 13-516(a)(1); and (2) an Order finding that SBC Illinois violated the federal Act and knowing engaged in prohibited conduct set forth in Section 13-514 of the PUA. The Commission issued an Order on March 9, 2005 granting XO's and Allegiance's request for emergency relief prohibiting SBC from unilaterally implementing its view of the Triennial Review Remand Order (“TRRO”). In its Final Order, the Commission properly determined that SBC violated multiple subsections of Section 13-514 and permanently prohibited SBC from implementing its view of the TRRO. In other words, XO and Allegiance received exactly the relief they requested. Yet, despite the Commission’s standard and XO’s and Allegiance’s litigation success, the Commission arbitrarily reduced XO’s and Allegiance’s award of attorney’s fees and costs to 70%.

In its Complaint, XO and Allegiance requested the following relief:

WHEREFORE, XO and Allegiance request that the Commission enter an order granting the following relief:

⁶ Final Order at 44 (citing *Globalcom, Inc. v. Illinois Commerce Commission*, 347 Ill.App.3d 592, 618 (1st Dist. 2004).

- (1) The Commission should enter an Order finding that SBC Illinois is violating the federal Act and that it is knowingly engaging in prohibited conduct set forth in Section 13-514 of the PUA that has an adverse impact on competition,
- (2) Pursuant to Section 13-516(a)(1) of the Act, the Commission should direct SBC Illinois to cease and desist violating the federal Act and the Public Utilities Act and not act upon the threat in its accessible letters to refuse to provide certain UNEs after March 11, 2005 and to raise the rates on certain UNEs as of that date.
- (3) Pursuant to 220 ILCS 5/13-516(a)(3) of the Act, the Commission should direct SBC Illinois to pay the costs and expenses, including attorneys fees, of XO and Allegiance in this proceeding; and
- (4) The Commission should grant such further or other relief as may be appropriate.

The most important request was paragraph 2, which asked the Commission to direct SBC to desist certain activity. The other three paragraphs provided the legal basis for the cease and desist request (paragraph 1, setting forth the fact that SBC violated the Public Utilities Act), request statutorily authorized relief which was in fact granted (paragraph 3, requesting attorneys fees and costs), or are boilerplate pleading language giving the Commission authority to craft relief without restriction of being limited to the Complaint language (paragraph 4). In the interim and final orders, the Commission awarded XO and Allegiance **everything** they requested in paragraph 2. There was no partial relief or qualification to the requested relief. XO and Allegiance received exactly the relief they requested in paragraph 2.

As its rationale to reduce XO's and Allegiance's attorney's fees to 70%, the Commission stated that although they "prevailed on most of its claims", XO and Allegiance asserted unsuccessful claims under subsections of 13-514 and presented

“claims for which it offered scant support, but which caused SBC to mount a defense.”⁷ Initially, XO and Allegiance believe that the Commission’s reasoning is contrary to the Commission’s acknowledgment that alleging multiple violations is “standard operating procedure in litigation.”⁸ Second, the amount of time SBC spent defending claims that were later withdrawn or not supported is completely irrelevant in the determination of an attorney’s fees award. It is the amount of time XO and Allegiance’s attorneys spent on unsuccessful claims that could perhaps be deducted from attorney’s fees, not SBC’s attorneys’ time. Third, there is no basis for the 30% figure. The Commission could direct XO and Allegiance to deduct from their attorney’s fees all time spent pursuing unsuccessful claims in their complaint, including unsuccessful allegations of *per se* violations. But it cannot, as it has done here, simply lop off 30% of their attorney’s fees without any support for that figure. Neither SBC nor XO and Allegiance could have spent 30% of their time on the *per se* allegations not pursued or supported. A review of pleadings and testimony shows scant evidence of either party expending resources on these tangential *per se* violations. Rather, in part, XO and Allegiance established over significant SBC testimony and briefing the following:

1. “The FCC did not intend that its new unbundled transport rules would permit ILECs to deny requests for Section 251 transport before ICA revision is completed.” Final Order at 19. Rather, “the FCC expects bilateral implementation.” *Id.*;
2. “The FCC did not intend that its new unbundled loop rules would permit ILECs to deny requests for Section 251 loops before ICA revision is completed.” Final Order at 22.;
3. “SBC must comply with the self-certification provisions of paragraph 234 of the TRRO (as it has stated it will do in AL-39), and is prohibited from

⁷ *Id.* at 44.

⁸ Final Order at 37-38.

imposing on a CLEC any self-certification requirement that does not expressly appear in paragraph 234 or in an approved ICA with that CLEC.”

4. XO and Allegiance have independent rights pursuant to Section 271 of the Federal Act to purchase UNEs. Therefore, “SBC must continue providing Section 271 unbundled loops, transport and switching . . . under the terms of their respective ICAs, unless and until those ICAs are amended to terminate SBC’s Section 271 obligations.” *Id.* at 27.
5. SBC is required by Section 13-801 to provide ULS/UNE-P and unbundled loops and transport to the complaining CLECs, irrespective of the TRRO. *Id.* at 31.

Those findings, and others, led the Commission to correctly award XO and Allegiance temporary relief pursuant to Section 13-516(a)(1) and ultimately determine that SBC violated six subsections of 13-514. Those were the issues where XO and Allegiance expended the bulk of their attorney’s fees and those were the issues where SBC concentrated its defense. XO and Allegiance were successful on their claims, and the Commission improperly reduced XO’s and Allegiance’s attorney’s fees and costs to 70%.

Illinois law supports an award of XO’s and Allegiance’s entire costs and attorney’s fees. Where a plaintiff’s claims of relief involve a common core of facts or are based on related legal theories, such that much of the plaintiff’s attorney’s time is devoted generally to the litigation as a whole, a fee award should not be reduced simply because all requested relief was not obtained. Becovic v. City of Chicago, 296 Ill.App.3d 236, 242 (1998); Riverside v. Rivera, 477 U.S. 561, 575-76 (1986). Thus, in Berlak, the court refused to reduce the attorney’s fees award where the plaintiff prevailed on only one count of her four-count complaint, because all counts involved common core of facts and similar legal theories. Berlak, 284 Ill.App.3d at 238-39.

The “common core of facts” principle used by Illinois courts is similar to the standard used by federal courts in Section 1983 civil rights actions. In Hensley v.

Eckerhart, the U.S. Supreme Court found that when claims are interrelated, as is often the case in civil rights litigation, parties may recover attorney's fees for time spent pursuing an unsuccessful claim if that time also contributed to the success of other claims. Hensley v. Eckerhart, 461 U.S. 424, 435, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983). The Supreme Court stated that in such cases:

[M]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Id.

In Jafee v. Redmond the 7th Circuit noted that it has used the "common core of facts" approach in Section 1983 cases, stating:

In the context of partial recovery cases, we have interpreted Hensley to permit attorney's fees for unsuccessful claims when those claims involved a common core of facts or related legal theories. *See, e.g., Spanish Action Comm. v. City of Chicago*, 811 F.2d 1129, 1133 (7th Cir. 1987) . . .

Hensley's rejection of "the mechanical claim-chopping approach", *see Lenard v. Argento*, 808 F.2d 1242, 1245 (7th Cir. 1987), has led us to an approach that is more in tune with the realities of litigation, in which we focus on the overall success of the plaintiff rather than the success or failure of each of the plaintiff's causes of action.

Jafee v. Redmond, 142 F3d 409, 414 (7th Cir. 1998).

Here, XO and Allegiance were successful on all of their **claims for relief**, thus the facts are far more compelling than those in each of the above cases. The most one can say is that XO and Allegiance were not successful in all of the **reasons** why they should receive that relief. Yet the arguments where they did not prevail shared the same common core of facts and related legal theories as those where it did prevail. Virtually

all of the tasks in this proceeding, including initial investigation, drafting the complaint, witness preparation, participation in hearings, and the drafting of pleadings, would have been the same if XO and Allegiance had not included the unsuccessful *per se* violations.

Finally, a full award of attorney's fees is appropriate when, as here, there is a society wide impact of litigation. The industry wide impact of the Commission's findings are analogous to the society wide impact of a judicial decision in a federal civil rights action. Courts have recognized that successful civil rights litigants benefit society, often in ways that far exceed the ordered monetary damages. Given those benefits to the public, courts are willing to award attorney's fees for successful civil rights litigants that are in excess of monetary awards to plaintiffs. As stated by the U.S. Supreme Court:

As an initial matter, we reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. See Carey v. Phipps, 435 U.S. 247, 266 (1978). And, Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff. ..." Hensley, 461 U.S., at 444, n. 4 (BRENNAN, J., concurring in part and dissenting in part). Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards.

Riverside v Rivera, 477 U.S. 561, 574, 106 S. Ct. 2686; 91 L. Ed. 2d 466 (1986).

Similarly, it is not relevant that the Commission did not find in favour of XO and Allegiance on all of the *per se* violations. The Commission found that SBC had engaged in some *per se* violations of the Act and granted relief that will benefit all CLECs and their customers. XO and Allegiance should therefore be awarded the full amount of their attorney's fees.

- III. Consistent with XO's and Allegiance's Argument on Attorney's Fees and Costs, the Commission Should Grant Rehearing and Re vise the Allocation of Costs to be Consistent with the Revised Attorney's Fees Awarded.

In its Final Order, the Commission apportioned the Commission's costs among the parties according to the "average CLEC award here for attorney's fees and costs."⁹ The percentage of costs should therefore be revised according to XO's and Allegiance's argument in Section II, above.

Dated: July 5, 2005

Respectfully submitted,

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⁹ Id. at 45.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the APPLICATION FOR REHEARING OF XO ILLINOIS, INC. AND ALLEGIANCE TELECOM, INC. has been served upon the parties listed on the attached service list on July 5, 2005, by electronic mail.

/s/ Stephen J. Moore

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